79564-9

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

VIRGIL R. MONTGOMERY,

Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT

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I.

INTRODUCTION

Respondent, State of Washington, respectfully submits this supplemental brief as permitted by RAP 13.7(d) to address one issue presented by the petition for review.

II.

ISSUE PRESENTED

(1) Did the unchallenged expert opinion testimony constitute manifest constitutional error?

III.

STATEMENT OF THE CASE

Petitioner/defendant Virgil Montgomery was convicted by a jury in the Spokane County Superior Court of possession of pseudoephedrine with intent to manufacture methamphetamine. CP 28. The State's evidence at trial consisted entirely of testimony from two officers who followed the defendant and his co-defendant as they shopped their way through several Spokane County stores, purchasing pseudoephedrine and items used to manufacture methamphetamine, and the testimony of a chemist who

explained how the substance was manufactured. RP 27-75, 107-120, 140-150.

On appeal, petitioner challenged one statement made by each of the three witnesses, contending that each statement constituted an opinion that defendant was guilty. Detective David Knechtel was asked if he had formed any opinions concerning the purchases made by the two subjects. RP 40. He replied: "I felt very strongly that they were, in fact, buying ingredients to manufacture methamphetamine based on what they had purchased, the manner in which they had done it, going from different stores, going to different checkout lanes. I'd seen those actions several times before." RP 40.

Detective Daniel Blashill was asked by the prosecutor why he did not immediately arrest the suspects when they purchased a gallon of acetone. RP 116. He responded: "It's always our hope that if the person buying these chemicals, that are for what we believe to be methamphetamine production, that we can take them back to the actual lab location and arrest ... ." RP 116.

The chemist, Matthew Jorgenson, was asked on cross-examination about the innocent uses for the alleged meth-making ingredients and whether this collection of ingredients was "pretty close to being able to make meth." RP 155. He replied that "in their totality, yes, this points me in

the direction that this is the starting or the collection of the materials used to make manufacture methamphetamine." RP 155. The prosecutor asked a series of questions on redirect examination about how the addition of each ingredient affected his thoughts about the probable use of the pseudoephedrine. RP 158-159. When asked what effect the matchbooks had on his opinion, he replied: "This is where my opinion would start becoming a little more solid." RP 159. He was asked about whether the acetone would make his opinion "solid." He replied: "Again, these are all what lead me towards this pseudoephedrine is possessed with intent." RP 160. The re-direct examination then concluded:

> Q. So, would you say that your opinion, based on what you observed in these photographs and the number of boxes of pseudoephedrine, your solid opinion is that this is indicative of the manufacture of methamphetamine?
>
> A. Indicative of? Oh yes. Very much so.

RP 160.

Defense counsel on re-cross examination asked that "if we eliminate some of the pseudoephedrine and some of the other items, your opinion is not as solid?" Jorgenson replied: "No sir. It is not." RP 161.

Defendant did not present any objection at trial. On appeal, he challenged this testimony as improper opinion testimony about guilt. The Court of Appeals disagreed, finding that if the defendant could even raise the

issue initially on appeal, the claim was without merit. The testimony was not a direct comment on the defendant's guilt and was proper expert testimony under ER 704. *See* Slip opinion at pages 8-10.

Defendant filed a petition for review that raised five issues. This Court granted the defendant's petition.

IV.

ARGUMENT

A. THE EXPERT OPINIONS WERE NOT A COMMENT ON DEFENDANT'S GUILT.

The Court of Appeals correctly found that the unchallenged testimony did not constitute error. Under this court's recent ruling in State v. Kirkman, 159 Wn.2d 918, 155 P.3d 125 (2007), the defendant's challenge could not be entertained for the first time on appeal. The testimony does not present a manifest constitutional issue.

Expert witnesses may testify to their opinions. ER 702.[1] Opinion testimony "is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." ER 704. The case law confirms that an expert opinion on an ultimate issue "has long been recognized" in Washington. State v. Kirkman, *supra* at 929. However, no witness may state

[1] Lay witnesses may do so as well under certain circumstances. ER 701.

that a defendant is guilty. *Id.* at 937 [*citing* State v. Garrison, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967), and State v. Trombley, 132 Wash. 514, 518, 232 Pac. 326 (1925)].

Testimony that only indirectly reflects on the credibility of a witness does not present an issue of manifest constitutional error. State v. Kirkman, *supra* at 934-937. That is the situation here.

In Kirkman this court addressed two consolidated cases of child abuse. In each instance, a medical doctor had testified concerning findings and the relationship of those findings to the child's report of abuse, and a detective had testified concerning the interview protocol used to determine whether the child was competent. *Id.* at 922-923, 924-925. In each instance this court concluded that there was no improper testimony.

As to the medical doctors, the fact that their observations supported the victims' testimony did not render the testimony an improper comment on the victims' veracity. *Id.* at 929-930, 931-933. Similarly, the testimony from the detectives concerning the children's competency and ability to tell the truth likewise was not a comment on veracity. *Id.* at 930-931, 933-934. This court concluded its analysis of the "indirect comment" issue:

> Admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a 'manifest' constitutional error. 'Manifest error' requires a

> nearly explicit statement by the witness that the witness believed the accusing victim. Requiring an explicit or almost explicit witness statement on an ultimate issue of fact is consistent with our precedent holding the manifest error exception is narrow.

Id. at 936 [citation omitted].

Likewise here, the now challenged testimony did not directly relate to the defendant's credibility or express an opinion that defendant was guilty. Rather, it simply related the assessment of these experts as to what was going on. While that evidence permitted the jury to conclude defendant was guilty, that decision was still up to them. *Id.* at 937.

The Kirkman opinion also included an "actual prejudice" analysis that is relevant here, too. The court noted that defense counsel had a tactical reason for not objecting to some of the testimony, part of which was helpful to the defendant. *Id.* at 937. The same is true here. It was the defense that opened up the issue with the chemist concerning the quantum of additional products necessary to show intent to manufacture. RP 155. The prosecutor's questioning in re-direct emphasized that it was the totality of the evidence, not one or two individual components, that factored into the expert's opinion. RP 158-160. Defense counsel then returned to that theme,

eliciting testimony on re-cross examination that the absence of a couple of items would change the opinion. RP 161.[2]

This topic was one the defense explored to its own benefit in an obvious effort to convince jurors that if they believed there was an innocent reason for some of the purchases the State's whole case would fall apart. This certainly was a valid tactical approach for counsel to take.

It similarly was understandable that counsel did not object to the detectives' testimony. The fact that the officers followed and subsequently arrested the defendant because they believed he was intending to manufacture methamphetamine was hardly novel information. Any juror would reach the same conclusion from the detectives' testimony. The detectives were suspicious and eventually arrested the two suspects. What juror would not understand that the detectives believed the defendant was involved in criminal activity? Nothing was to be gained by objecting to the obvious.

The expert testimony did not amount to a direct statement that defendant was guilty. There also was nothing surprising about the testimony. The belatedly challenged testimony does not present an issue of manifest constitutional error.

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[2] Defense counsel also explored, in much less detail, the same topic in his cross examination of the detectives. RP 96, 131-133.

V.

CONCLUSION

For the reasons stated, the decision of the Court of Appeals should be affirmed.

Respectfully submitted this 29th day of November, 2007.

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